Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Immaculate Conception Apostolic School	)	File No. BLED-20130719AAO
	)	File No. BNPED-20071022AIX
Applications For a Construction Permit and	)	Facility ID No. 176615
Covering License for Noncommercial Educational	)	
Station DKJPT(FM) at Colfax, California	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 15, 2016 **Released: December 15, 2016**

By the Commission:

1. We have before us an August 29, 2016, Application for Review (AFR)[1] filed by Immaculate Conception Apostolic School (ICAS), former permittee of noncommercial educational (NCE) Station KJPT(FM), Colfax, California (Station). ICAS seeks review of the Media Bureau's (Bureau) July 25, 2016 dismissal[2] of ICAS' March 9, 2016 Petition for Reconsideration (Petition II).[3] For the reasons set forth below, we deny the AFR.

2. *Background*. ICAS was selected from among five applicants that had filed mutually-exclusive applications in NCE MX Group 315.[4] In its captioned construction permit application,[5] ICAS provided its mailing address as 28000 Rollins Lake Road, Colfax, California 95713.[6] It certified that "it qualifies as a local applicant pursuant to 47 CFR Section 73.7000, [and] that its governing documents require that such localism be maintained . . . ."[7] In reliance on that certification by ICAS, the Bureau granted the construction permit for the Station (Permit) on August 11, 2010, concluding that its claimed status as a local entity was determinative,[8] and specifying a three-year construction period.[9]

[1] On November 2, 2016, William Battles (Battles), President of Vida Vivr, Inc. (VWVI), a former competing applicant with ICAS, filed an "Objection" to the AFR, against which ICAS filed a Motion to Strike on November 15, 2016. On December 9, 2016, Battles filed an Opposition to the Motion to Strike. We dismiss these untimely and unauthorized pleadings without consideration pursuant to 47 CFR § 1.45.

[2] *See Letter to Jerrold Miller, Esq., and Dennis J, Kelly, Esq.,* Ref. 1800B3 (MB rel. Jul. 25, 2016) (*Letter Decision III*).

[3] The AFR inaccurately characterizes *Letter Decision III* as "denying" Petition II. AFR at 1.

[4] *See Comparative Consideration of 52 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 8793, 8806, para. 37 (2010) (52 Group Order).

[5] File No. BNPED-20071022AIX (Permit Application).

[6] *See* Permit Application at Section I, Item 1.

[7] *Id.*, Section IV, Item 1.

[8] *See 52 Group Order*, 25 FCC Rcd at 8806, para. 38.

[9] *See Broadcast Actions,* Public Notice, Report No. 47300 (rel. May 16, 2010).

3. On July 19, 2013, ICAS filed the above-captioned application for a license for the Station which, *inter alia,* provided a mailing address that was different from the Colfax address specified in its Permit Application: c/o Rev. Jose Felix Ortega, 590 Columbus Avenue, Thornwood, New York 10594.[10] ICAS provided no explanation for this change, and certified, in response to Section II, Item 3 of the License Application, that "no cause or circumstance has arisen since the grant of the underlying construction permit which would result in any statement or representation contained in the construction permit application to be now incorrect." VWVI, the competing applicant with which ICAS would have been tied on points, but for the three additional points awarded ICAS for being a local entity,[11] filed an informal objection to the License Application. VWVI alleged that ICAS had closed its Colfax "brick and mortar" school in 2011, vacated the school buildings and put them up for sale.[12] In its Opposition, faced with the showing by VWVI, ICAS acknowledged that it had done so, notwithstanding its certification in the License Application that no circumstances had changed.[13] On March 6, 2015, the Bureau dismissed the License Application and cancelled the Permit, finding that ICAS was not a "local applicant"[14] when it filed the License Application because it had closed its "local campus" in June 2011 and that, as disclosed in the Permit Application, all of ICAS' officers and governing board members resided outside of California, in New York or New Hampshire,[15] thus presenting a "cause or circumstance" that eliminated the reason for its comparative selection and accordingly would make its operation of the Station contrary to the public interest.[16]

4. ICAS sought reconsideration of *Letter Decision I* (Petition I), which the Bureau staff denied.[17] The Bureau also clarified that, although ICAS had certified in the Permit Application "that for at least the 24 months immediately prior to application, *and continuing through to the present*, it qualifies as a local applicant pursuant to 47 C.F.R. Section 73.7000 . . . ," ICAS had failed to meet its obligation to maintain that status for four years of on-air operations. Thus, the Bureau found that the Permit expired by its own terms on the August 11, 2013 construction deadline, and was forfeited on that date pursuant to Section 73.3598(e) of the Rules.[18]

5. On March 9, 2016, ICAS filed a petition for reconsideration of *Letter Decision II* (Petition II), arguing that further reconsideration was warranted pursuant to Sections 1.106(m) and 1.115(c) of the Rules[19] due to new case precedent[20] issued since ICAS had filed its Petition I that ICAS

[10] File No. BLED-20130719AAO (License Application) at Section 1, Item 1.

[11] File No, BNPED-20071019AEZ, dismissed August 9, 2010. *See Letter Decision I*, fn 3; *52 Group Order*, 25 FCC Rcd at 8806, para. 38.

[12] *See* "Opposition to Application for License" of Vida Worth Vivr, Inc., filed on August 19, 2013 (Informal Objection) at 2, to which ICAS filed an Opposition on June 11, 2014 (ICAS Opposition) and VWVI a Reply on July 1, 2014.

[13] ICAS Opposition at 2-3.

[14] *See* 47 CFR § 73.7000.

[15] Permit Application, Section II, Item 6(a).

[16] *See Letter to Jerrold Miller, Esq., and Dennis J, Kelly, Esq.,* Ref. 1800B3 (MB rel. Mar. 6, 2015) (*Letter Decision I*).

[17] *See Letter to Jerrold Miller, Esq., and Dennis J, Kelly, Esq.,* Ref. 1800B3 (MB rel. Feb. 3, 2016) (*Letter Decision II*).

[18] *Id.* at 4, citing *Reexamination of Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132, 13134 para. 6 (2002) (*NCE Second Reconsideration Order*) and 47 CFR § 73.3598(e).

[19] 47 CFR § 1.106(m), 1.115(c); Petition II at 2-3.

[20] *Cont'l Media Group, LLC,* Letter, Ref. 1800B3 (MB Feb. 12, 2016) (*Cont'l Media*).

claimed to be "totally at odds with the result in [this] case and raises an issue of fundamental fairness."[21] In *Letter Decision III*, the Bureau dismissed Petition II, concluding that, because the precedent cited by ICAS was inapposite, it had failed to establish the "extraordinary circumstances" required by Section 405 of the Act[22] and Section 1.106 of the rules for the filing of a second petition for reconsideration.[23] The Bureau also declined ICAS' request to enter into settlement negotiations to allow it to continue as the licensee of the station if it paid a monetary penalty.[24]

6. On review, ICAS claims that the Bureau gave "short shrift" to its arguments[25] and reiterates *verbatim* arguments previously raised before the Bureau. According to ICAS: (1) "it seems"[26] that the Bureau was enforcing an implied requirement -- the surrender of the ICAS Permit -- when it closed its school, and the Commission failed to give adequate notice that it would dismiss a license application in these circumstances;[27] and (2) the Bureau treated ICAS more harshly that it had other licensees in various enforcement and licensing actions involving either allegations of the broadcast of indecent programming or in granting applications involving a 50 percent principal of a licensee whose basic qualifications were at issue. ICAS contends that these latter licensing actions constitute disparate treatment in violation of the dictates of *Melody Music*[28] and evidence discrimination against Roman Catholics.[29]

7. *Discussion*. We conclude that the Bureau in *Letter Decisions II* and *III* properly resolved the matters considered therein, and we uphold the Bureau's dismissal of the License Application and cancellation of the Permit. We affirm the dismissal of Petition II because it did not meet the narrow grounds for reconsideration of Petition I specified in Section 1.106(c) of the Rules claimed by ICAS: the issuance of relevant new precedent.[30] For the reasons discussed below, the precedent cited is inapposite here. Accordingly, we affirm the Bureau's dismissal of Petition II.

8. As a separate and independent ground for our actions here, the Bureau properly dismissed the License Application and cancelled the Permit because, as stated in *Letter Decision II,* by ICAS's admission, ICAS failed to satisfy its obligation to presently meet and maintain its local status for four years of on-air operations.[31] In its AFR, ICAS claims that it lacked sufficient notice of the potential consequences of its termination of local operations in Colfax, in violation of *Salzer*. Thus, it states that "we cannot find in the published Code of Federal Regulations… an implied requirement for ICAS to turn in its construction permit the moment it closed its brick and mortar school." It claims that its intent was "to remain local in the Colfax area through the construction and operation of radio station KJPT and the

[21] *Petition II* at 2.

[22] 47 U.S.C. § 405.

[23] *Letter Decision III* at 3.

[24] *Id*.; Petition II at 6.

[25] AFR at 4.

[26] *Id.* at 5.

[27] *Id.* at 4-5, citing *Salzer v. FCC,* 778 F.2d 869, 875 (D.C. Cir. 1985) (*Salzer*).

[28] *Melody Music, Inc. v. FCC,* 345 F. 2d 730 (D.C. Cir. 1965) (*Melody Music)*.

[29] AFR at 6-10, referencing *Infinity Broad. Operations, Inc.*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 19954 (2003) (*Infinity NAL*) and the unpublished staff decision in *Cont'l Media*. ICAS also mentions a "deal" with "Emmis Broadcasting" but provides no supporting citation. AFR at 10.

[30] *See* 47 CFR § 1.106(c)(1), which in turn references § 1.106(b)(2).

[31] *See NCE Second Reconsideration Order*, 17 FCC Rcd at 13134, para. 6 ("The forward-looking holding period requires a reserved channel licensee that was selected by point system to adhere to those commitments on which its comparative qualifications were established. It guarantees that selection factors will be maintained at least four years into the future.").

presentation of religious educational programming over it."[32] There was no requirement, implied or otherwise, that ICAS surrender the Permit when it closed its school. It was, however, required to honor its certification to maintain its local status through 2017.

9. In contrast to the situation in *Salzer*, in which the court held that the Commission could not dismiss low power television applications because they failed to meet acceptability criteria that had not been sufficiently articulated by the Commission,[33] ICAS had clear notice of the Commission's requirement that NCE applicants receiving comparative credit for claimed local operations must retain those characteristics for four years after they begin station operations. In its 2000 Order reexamining the comparative standards for NCE applicants, the Commission expressed its desire to ensure that "the benefits of localism are not purely ephemeral" after noting the "long-recognized significance of localism to noncommercial educational broadcasting." Accordingly, it "decided to establish a four-year holding period of on-air operations during which licensees would be required to maintain the characteristics for which they receive credit in a point system."[34] ICAS' reliance on *Salzer* to establish lack of adequate notice is therefore misplaced. As noted above, ICAS had unambiguous notice of the requirement that it had to retain its local status, as defined by Section 73.7000, and should have reasonably anticipated that its failure to do so would result in the dismissal of its License Application and loss of its Permit.

10. ICAS fails to provide any explanation as to why the cases it relies on to show dissimilar treatment are relevant. We find that they are inapposite. The *Infinity NAL* was an indecency enforcement action that was subsequently resolved by Consent Decree, not a licensing decision. In *Cont'l Media* (the "new" case that ICAS cited to justify its submission of its Petition II), the staff approved the transfer of the 50 percent interest of a broadcast licensee held by a convicted felon for no consideration and also granted the station's license renewal application. ICAS is simply not similarly situated to the applicants in that case or the licensees in the indecency enforcement proceedings upon which it relies.[35] Accordingly, we reject as meritless ICAS' *Melody Music* argument.

11. For the same reasons, we conclude that the Bureau's actions do not evidence any indication of discrimination against ICAS on the basis of its religious beliefs or otherwise. ICAS obtained its authorization based on its certification that it was a local entity and its commitment to remain so for four years after its Station commenced operations. Because ICAS failed to honor that essential commitment, it was appropriate for the Bureau to conclude that grant of the License Application would not be in the public interest.

12. Finally, we also affirm the Bureau's rejection of the settlement overture proffered by ICAS in Petition II. As correctly noted in *Letter Decision III,* the Commission holds broad discretion over such matters once a violation or defect in an application has been uncovered.[36] ICAS's claim that the

[32] AFR at 6. We agree with the Bureau's determination in its Letter Decision II that ICAS's claimed residual activities in Colfax do not meet any of the criteria for a local applicant contained in Section 73.7000 of the Rules. *Letter Decision II* at 2. Indeed, ICAS's contention is that its construction and operation of the Station in Colfax after closing its school and otherwise terminating its presence there, with all of its officers and board members residing nearly 3000 miles from Colfax, satisfied the four-year local presence requirement. Acceptance of ICAS's position would make a nullity of that requirement and be inconsistent with the Commission's preference for locally-based licensees: their enhanced ability to become aware of community needs and treat them in their broadcast programming.

[33] *See Salzer*, 778 F. 2d at 871-2, 875-6.

[34] *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7407, para. 48 (2000).

[35] *See Melody Music,* 345 F. 2d at 733.

[36] *Letter Decision III at 3,* citing *Great Lakes Cmty. Broad., Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 13487, 13489, para. 3 (MB 2009), in turn citing *Radio One Licenses, LLC*, Forfeiture Order, 19 FCC Rcd 23,922, 23,932, para. 24 (2004); *Viacom, Inc.,* Order on Reconsideration, 21 FCC Rcd 12223, 12226, para. 6 (2006).

Bureau's refusal to entertain such a request, instead cancelling its permit and dismissing its license application, constituted a "draconian and disproportionate penalty," has no basis in law, fact or equity.[37] The Bureau appropriately concluded that a settlement allowing the non-local ICAS to continue to operate the Station with principals located thousands of miles away would not be in the public interest.

13. Accordingly, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the August 29, 2016, Application for Review filed by Immaculate Conception Apostolic School, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[37] AFR at 2. As an alternate and independent ground for our holding here, we reject ICAS's contention that equitable considerations should have compelled the Bureau to allow it to retain the station authorization. AFR at 8. ICAS cites no authority, nor are we aware of any, that supports its position that the Commission should license its facility under such circumstances. Allowing permittees who prevailed over competing applicants in comparative cases to retain a permit despite their failure to maintain the comparative characteristic upon which they were preferred would be unfair to other applicants and undermine our comparative licensing procedures. Essentially, it would incentivize applicants to claim a comparative preference and then, when they fail to maintain the basis for the preference, simply pay a fine and retain the license. This would not only be unfair to other applicants, but would also deprive the public of the service – here a noncommercial educational radio service from a local entity – that we have concluded would best serve the public and formed the basis for the grant.